

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JAMES J. KUHNS, Petitioner

July 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-0026 (BOR Appeal No. 2044745)**
(Claim No. 990046860)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WINDSOR COAL COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner, James J. Kuhns, by M. Jane Glauser, his attorney, appeals the Board of Review Order denying a request for reopening for a psychiatric permanent partial disability. The West Virginia Office of Insurance Commissioner, by Jack M. Rife, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 9, 2010, in which the Board affirmed a June 1, 2010, order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges modified the claims administrator's refusal to reopen this claim for additional psychiatric permanent partial disability. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition, response, and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Kuhns's disability arises from an entrapment between a continuous miner and a wall of coal. This accident resulted in lumbar and pelvic fractures, a torn right rotator cuff, rectal incontinency, and erectile dysfunction. On April 11, 2005, Mr. Kuhns was awarded 13% permanent partial disability (hereinafter "PPD"). Thereafter, Mr. Kuhns sought additional permanent partial disability for post traumatic stress disorder (hereinafter "PTSD"). On August 16, 2005, Mr. Kuhns was awarded permanent partial disability for PTSD.

On September 11, 2009, Mr. Kuhns petitioned to reopen the claim on a psychiatric permanent partial disability basis. Subsequent to the August 16, 2005, PPD award Mr. Kuhns received an additional evaluation from Dr. Cheryl Hill who opined Mr. Kuhns's PTSD has worsened since the initial psychiatric PPD and requested an additional 8% PPD award. Dr. Hill found Mr. Kuhns now avoids enclosed spaces, does not have interest in most activities and is quiet and distant. Mr. Kuhns stated he is now quick to anger and has trouble sleeping; Mr. Kuhns's wife corroborated Mr. Kuhns's statements. Based upon this new evaluation, Ms. Hill found Mr. Kuhns suffers from PTSD, chronic and recommended an 18% whole person impairment in accordance with West Virginia Code of State Rules § 85-20-B.

The claims administrator denied Mr. Kuhns's reopening request by amended undated order, stating that Mr. Kuhns's request was denied based upon West Virginia Code § 23-4-16(e), providing that a claimant may have only one request for a permanent disability award pending in a claim at any one time, and West Virginia Code § 23-4-16(a)(2), since the request was filed more than five years after the initial award of permanent partial disability.

The Office of Judges found the record demonstrates Mr. Kuhns suffered significant physical and psychiatric disabilities as a result of the compensable injuries. However, the Office of Judges also found the denial of reopening was based upon legal arguments rather than factual ones. As a result, the Office of Judges held the statutory and common law does not allow this claim to be reopened on a psychiatric permanent partial disability basis by Mr. Kuhns's petition of September 11, 2001, due to the initial award of permanent partial disability being granted on April 11, 2001. The Office of Judges, too, found no basis for granting Mr. Kuhns's reopening request or for disputing the claims administrator's findings. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges in its decision of December 9, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Court affirms the Board of Review Order denying Mr. Kuhns's request to reopen this claim for additional permanent partial disability.

Affirmed.

ISSUED: July 26, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum